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An Alberta Example

I. *Introduction*

It is no secret that public awareness and concern for environmental protection in Canada has increased significantly in recent years. Legislators have addressed these concerns by implementing new laws to regulate the various practices that impact negatively on the environment. With statutes in hand, environmentally conscious individuals are beginning to intervene personally to monitor compliance and ensure enforcement of these new laws.

It is well accepted that laws must be enforced in order to achieve their purpose. Canadians have generally delegated this duty to the State. However, mechanisms are in place in this country that enable individuals to participate directly in law enforcement. Theoretically, an individual who believes a law has been infringed has two options. He or she may persuade the appropriate government authority to investigate the allegation and proceed with the matter. In the alternative, he or she may lay a private information and thereby personally compel the accused to stand trial in a court of law. This second option of private prosecution, once the central enforcement mechanism in British criminal law, is a statutorily entrenched right in Canada.[1]

In practice, private enforcement of Canada's environmental laws is often more apparent than real. It is becoming frustratingly difficult for those persons who have probable grounds to compel offenders to the courts if the State has neither the will nor desire to enforce the laws. What is more worrisome is the fact that this lack of will on the part of government, arguably often motivated by political forces, is becoming more prevalent today.

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1. See E. Greenspan, *Martin's Criminal Code,* (1990), s. 574.

This paper explores individual enforcement of Canada's environmental protection laws in light of this criticism. The Alberta example of the Oldman River Dam is used to illustrate just how difficult enforcement can be if certain factors are present. Very little has been written on environmental law enforcement in general and private enforcement in particular. This is curious in light of the current citizen activism in the area.

II. *The Oldman River Dam Case*

The Oldman River is located in the southwest corner of Alberta. An agreement was reached between the Alberta Ministry of the Environment and W.A. Stephenson Construction Company to build a large dam on this river, five miles north and two miles east of the Town of Pincher Creek. The official purpose of this dam was to provide an irrigation reservoir for agricultural needs.[2] On or about July 21, 1988, the natural course of approximately one and one half miles of the Oldman River near Pincher Creek became a dry river bed as a result of the diversion tunnels becoming operational.

Dr. Martha Kostuch, a veterinarian, collected evidence that suggests the diversion project caused actual destruction to a once burgeoning fish habitat. As a result, she laid a private information alleging that Mr. Kenneth Kowalski (Alberta Minister of the Environment at the time), the Alberta Environment, Ralph McManus (Project Manager with the Alberta Ministry of the Environment at the time) and W.A. Stephenson Construction carried on work or an undertaking that resulted in the harmful disruption of fish habitat contrary to section 31(3) [now section 35(1)] of the *Fisheries Act*.[3]

The relevant sections of the *Fisheries Act* state as follows:

> 35(1)
> No person shall carry on any work or undertaking that results in the harmful alteration disruption or destruction of fish habitat.
>
> 35(2)
> No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under the regulations made by the Governor in Council under this Act.

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2. as per B. O'Ferral, "The Oldman Dam and Kananaskis Highway Cases" in *Resource News* (Apr. 1988) p. 11, at p. 18.
3. *Fisheries Act*, R.S.C. 1985, c. F-14, s.35(1).

40(1)
Every person who contravenes subsection 35(1) is guilty of an offence and liable

(a) on summary conviction, to a fine not exceeding five thousand dollars for a first offence and not exceeding ten thousand dollars for each subsequent offence; or
(b) on conviction on indictment, to imprisonment for a term not exceeding two years.[4]

Dr. Kostuch researched section 35(2) conditions and discovered that no conditions were authorized by the Canadian Minister of the Environment. She also was unable to find any regulation or Order in Council respecting that matter.[5]

On August 2, 1988 the private Information was sworn before a Justice of the Peace. Thereafter, a process hearing was conducted and process was issued. The Information was returnable in the Provincial Court of Alberta on August 30, 1988.

On August 3, 1988 Dr. Kostuch's lawyer wrote to the Federal Department of Justice and requested that the Attorney General of Canada assume the conduct of Kostuch's private prosecution and effect service of each Summons upon the relevant Defendants.[6] The Department of Justice responded by serving the Defendants but it requested more information before it would assume the prosecution.[7] More information, accordingly, was provided.

On August 18, 1988, the Ministry of Justice indicated that the Federal Attorney General would not intervene in the case of *The Queen* v. *Kowalski et al.* It stated that, in view of the definition of "Attorney General" as provided in s. 2 of the *Criminal Code* and as interpreted by the Supreme Court of Canada in *The Queen* v. *Sacobie and Paul*,[8] it would not be an appropriate case for such intervention.[9]

Section 2 of the *Criminal Code* states:

"Attorney General"
(a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and . . .

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4. *Ibid*, ss. 35, 40.
5. This was ascertained through a telephone conference between Dr. Kostuch and myself.
6. Dr. Kostuch has provided several pages of correspondence which serve as proof of these facts.
7. *Ibid.*
8. *The Queen* v. *Sacobi and Paul* (1979), 51 C.C.C. (2d) 430 (N.B.C.A.) affirmed 1 C.C.C. (3d) 446 (S.C.C.). See especially propositions 5 and 6 at pp. 442-443 of the Court of Appeal decision.
9. *Supra*, note 6.

(b) with respect to
(ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that government in respect of a contravention of or conspiracy to contravene any Act of Parliament other than this Act or any regulation made thereunder, means the Attorney General of Canada and includes his lawful deputy.[10]

Limerick, J.A. in the *Sacobie* case, provides the following interpretation of the above section. With respect to offences that are not criminal according to section 91(27) of the *British North American Act, 1867,*[11] if an information is laid by the Government of Canada and counsel appears on behalf of the Attorney General of Canada to conduct the prosecution he has exclusive jurisdiction. If the information is laid by anyone other than on behalf of the federal government the provincial Attorney General may appear and conduct the prosecution. If the information is laid by someone other than the Attorney General of Canada or the Attorney General of the province and neither intervene then the private person may prosecute.[12] The Ministry of Justice argues that fisheries matters fall under section 91(12) of the *British North American Act,* and since the Information was launched by a private informant the Attorney General of Canada must defer to provincial intervention.

On or about the same time as the Ministry's response, the Alberta Attorney General became aware of the Information sworn by Kostuch. It stated that the provincial Crown intervenes in all criminal matters in the Province of Alberta that are not within the jurisdiction of the Federal Attorney General (*ie:* Kostuch's case).[13] Furthermore, it was Department policy that before any criminal matters could be prosecuted an investigation had to be conducted by the appropriate enforcement agency. This investigation may be initiated by a citizen making a proper complaint to that agency and turning over any information in support of the complaint. Any evidence gathered is then reviewed by the Department to determine if a prosecution should be conducted.

The Attorney General of Alberta advised that no complaint was made or investigation conducted by the appropriate enforcement agency.[14] Accordingly, it planned to enter a stay of proceedings on the prosecution. Kostuch's lawyer responded by providing evidence of the *Fisheries Act*

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10. *Supra,* note 1, s.2.
11. Now s. 91(27) of the *Constitution Act, 1867*
12. *Supra,* note 8, at pp. 442-443.
13. *Supra,* note 6.
14. *Ibid.*

infraction yet the Alberta Crown still stayed the action. Essentially this meant that the prosecution was suspended indefinitely.

In the case of environmental prosecutions it has been the experience of private informants that, regardless of the legal basis for their case or the strength of the evidence collected on their own accord, the [Alberta] Crown has intervened to stay the proceedings.[15] This has been the experience regardless of the fact that the documented evidence is often presented to the Attorney General himself. In Kostuch's case the stay is particularly regrettable. Arguably there is at least a perceived conflict of interest when the Attorney General suspends a *prima facie* and legitimate action against one of its own ministries.

As a result of the steps taken by the Alberta Crown Dr. Martha Kostuch was rendered helpless in her attempt to bring possible perpetrators of an environmental protection law to justice. Not only did this have a demoralizing effect on the private informant with a *bona fide* case but it also rendered such legislation nugatory.

III. *The Canadian Private Prosecutorial System and Its Problems*

There exists, arguably, two avenues of exploration with respect to the state of affairs in the *R.* v. *Kowalski et al.* case. First, the provincial level of intervention should be examined by looking at Crown discretion to stay private prosecutions and judicial review of this power. Second, federal responsibility with respect to an alleged fisheries offence should be explored. Here it is appropriate to look at the possible application of a mandamus action compelling the Federal Justice Department to launch an information on behalf of the Attorney General of Canada.

A private prosecution is a criminal action launched by a private citizen. Private prosecution exists to ensure that violators of the law are brought before the courts[16] and it acts as a safeguard in cases where government fails to enforce the law. The private prosecutor is understood to be an individual, or group or corporation (other than a public authority) not acting in any public capacity.[17]

The statutory authority for private prosecutions concerning fisheries matters is found in the *Criminal Code,* the Canadian *Interpretation Act,* and the *Fisheries Act* .[18] As stated previously, section 2 of the *Criminal*

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15. L.F. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecutions* (Edmonton: Environmental Law Centre, 1990) at p. 63.
16. *Ibid.*
17. Law Reform Commission of Canada, *Private Prosecutions* (1986), Working Paper 52, at p.1.
18. E. Greenspan, *Martin's Criminal Code* (1990), ss.2, 574, 579, 795. *Interpretation Act,* R.S.C. 1985, c. I-21, s. 34(2). *Fisheries Act,* R.S.C. 1985, c. F-14, s. 35(1).

Code defines "prosecutor" as either the Attorney General or, where the Attorney General does not intervene, the person who institutes proceedings. A prosecutor may prefer an indictment under section 574 of the *Criminal Code.*[19] Section 574(3) requires that a private prosecutor obtain written consent of a judge in cases where the Attorney General does not intervene. Section 795 provides for the prosecution of summary conviction offences in a manner similar to section 574. Essentially, then, the *Criminal Code* provides the general legislative framework for conducting the private prosecutions.

The *Interpretation Act*[20], a federal enactment, links the *Criminal Code* to the *Fisheries Act.* Section 34(2) of that Act states:

> All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.[21]

Since the *Fisheries Act* is a federal statute the *Criminal Code* applies to that Act unless something in that Act states otherwise. Section 40 of the *Fisheries Act* [22] provides the option of proceeding by way of indictment or summary offence. There are no provisions that transcend the standard prosecutorial provisions of the *Criminal Code.*

The Law Reform Commission of Canada has set out the procedure for laying a private information, taking into consideration the above legislative framework.[23] In order to lay a charge the informant must have reasonable and probable grounds that an offence has been committed. He or she need not have been a witness to the set of events comprising the offence. As well, he or she need not be a victim of the crime.

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19. *Supra,* note 1.

    s.574(1)
    Subject to subsection (3) and section 577, the prosecutor may prefer an indictment against any person who has been ordered to stand trial in respect of (a) any charge on which that person was ordered to stand trial, or (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial, whether or not the charges were included in one information.

    s.574(3)
    In any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene, an indictment shall not be preferred under subsection (1) before any court without the written order of a judge of that court.

20. *Supra,* note 18.
21. *Ibid, Interpretation Act,* s.34(2).
22. *Supra,* note 3.
23. *Supra,* note 17, at pp. 6-7.

The Justice is obliged to receive the information if all of the formal requirements are met. This Justice is empowered to issue process where he or she considers the case to be reasonably founded. Essentially his or her power is discretionary.

If the informant has met all of the above procedural requirements he or she can elect to proceed with the trial himself or herself or try to persuade the Attorney General to intervene and prosecute. In *R.* v. *Schwerdt*[24], Wilson, J. confirms that a private person has the right to "keep the ball rolling" should the Crown fail to intervene in the case. In that case she held, "The fact is that such a prosecution may be permitted, and indeed, must be permitted, unless prohibited by statute."[25]

If the Attorney General does decide to intervene it can do so in three ways. It may elect to pursue the prosecution, withdraw the charge, or enter a stay on the proceedings. These three options are examined in detail later in the paper. It is important to realize that should the Crown intervene the private informant loses standing to continue the prosecution privately.

If the Attorney General elects to pursue the prosecution, as was requested by Kostuch in the Oldman River case, then the private informant is relieved of the burden of proving the offence. As well, the informant will have the satisfaction of knowing that the process is being carried out to final judgment on its merits.

If the Crown intervenes to withdraw the charge, presumably due to the lack of evidence, then there is no charge remaining on the record. Essentially such an action has the effect of ending the proceedings. In order to continue the prosecution a new charge would have to be laid. The case law suggests that the Crown's right to withdraw is an unfettered one. Kirby, J., adopting the decision in *R.* v. *Allen,* held, "The constitutional prerogative of the Crown is entrusted to the law officer of the Crown, who, on his own responsibility, determines whether a prosecution shall go on or not; and this court has no right or power to interfere in the matter."[26]

The third option available to the Crown, the power to stay an action, is, arguably, a very powerful and severe one. The Attorney General elected to pursue this option in the Oldman River case. Here, the Crown has no obligation to inform the informant of its actions; it need not give reasons for entering the stay; and its decision has historically not been

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24. *R.* v. *Schwerdt* (1957), 27 C.R. 35 (B.C.S.C.).
25. *Ibid,* at p.46.
26. *R.* v. *Leonard* (1962), 37 C.R. 374 (Alta. S.C.), at p.380. Kirby, J. quotes Blackburn, J. in *R.* v. *Allen* (1862), 121 E.R. 928.

reviewable by the courts. The only remedies available to the private prosecutor wishing to question the stay is to have the matter raised in the provincial Legislature or federal Parliament.[27] Otherwise, according to the authority of *R. ex rel. McNeil* v. *Sanucci*[28], the informant can swear another information and hope that it too does not get stayed. Neither of these remedies has been terribly successful in Canada.[29]

The statutory authority for staying an action is found in section 579 of the *Criminal Code*. That provision states:

> 579(1)
> The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
>
> 579(2)
> Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.[30]

It is clear that section 579 provides the Attorney General with a very wide and sweeping power. It is frustrating that it fails to codify any requirements that must be met in order for a stay to be warranted. Is it designed simply to provide the Crown with an absolute discretionary power, or is it designed with the intent of suspending specific repugnant prosecutorial processes?

Regardless of intent, in *Re Dick*[31], Leiff, J. held that section 490 [now section 579] of the Code applies as early as the preliminary enquiry stage of the prosecution. More recent cases have held that the power to stay can be exercised as soon as process is issued.[32] Furthermore, the manner

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27. *Supra*, note 15.
28. *R. ex rel. McNeil* v. *Sanucci*, [1975] 2 W.W.R. 203 (B.C. Prov. Ct.), at p.206.
29. The Legislative Debates on or about May 19, 1988 concerning the Diashowa Paper Mill proposal, another project of environmental concern, and Alberta's history of liberal use of the stay of proceedings power illustrate just how futile these options are.
30. *Supra*, note 18, s.579.
31. *Re Dick*, [1968] 4 C.R.N.S. 102 (Ont. S.C.), at p. 109.
32. See *Dowson* v. *The Queen*, *infra*, note 33.

in which the Attorney General exercises his discretion in this regard is not properly reviewable by the courts. The rationale for this position is that the Attorney General is the representative of the Queen. As such, he or she will, at all times and in all circumstances, exercise his or her powers and discretion in a manner consistent with an honourable servant of Her Majesty. The Crown is assumed to be unbiased and just in the decisions it makes. Therefore, it should not be subjected to judicial scrutiny that may interfere with its ability to carry out its duties. Rather, the Attorney General and his or her agents are answerable only to the legislature in the province where he or she operates.

It is interesting that the Canadian case law has historically reflected Leiff, J's interpretation of section 579. Only recently have some lawmakers questioned the practice. *Dowson* v. *The Queen*[33] is a case in which the appellant laid informations before a Justice of the Peace alleging the commissions of indictable offences. Prior to the commencement of the process hearing, the Attorney General stayed the proceedings pursuant to the authority under section 508 [now section 579] of the *Criminal Code.* The appellant sought judicial intervention to compel the hearing of the informations. The Supreme Court of Canada agreed that a stay should not be entered before a Justice decides whether or not to issue process. But more importantly, Lamer, J. hints at the severity of section 579 and how courts should be more sensitive to the rights of private informants. He states:

> The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a Justice of the Peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to 'hear and consider' the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply accommodating the policy consideration that supports the power to stay.[34]

Although Lamer, J. fails to consider the merits of entering a stay on the case in general, he has travelled down a relatively uncharted path by upholding the citizen's right to at least present evidence to determine if process should be issued. Now that the *Canadian Charter of Rights and Freedoms* is firmly rooted in our legal system it has been speculated that judicial review of Crown discretion with respect to staying of actions stands a greater chance of success. It is suggested that the *Charter,*

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33. *Dowson* v. *The Queen,* [1983] 2 S.C.R. 144.
34. *Ibid,* at p. 155.

requiring review of executive action against normative concepts, will encourage and impel judges to reconsider their role in controlling prosecutorial conduct that falls strictly within the letter of discretion, but that nevertheless offends some basic notion of justice and fairness.[35]

In reality, the case law does not reflect these predictions. Three cases illustrate just how hesitant judges are to intervene and use *Charter* provisions (namely sections 7 and 15) to curtail Crown discretionary powers. There are common themes running through each of these cases.

In *Campbell* v. *Attorney General of Ontario*[36] the plaintiff requested a declaration that the stay of proceedings directed by the Attorney General for Ontario in respect of seven counts of procuring a miscarriage is void and of no force and effect. The plaintiff alleged that the Attorney General's actions are inconsistent with sections 7 and 15 of the *Charter.* Craig, J. asserts that the allegations in the statement of claim did not support any reasonable cause of action whereby the plaintiff has been deprived of his personal *Charter* rights.[37] Accordingly, the plaintiff does not have standing to seek review of prosecutorial discretion of the Attorney General. The judge continues by citing *R.* v. *Moore et al.*[38] He states that if every exercise of discretionary authority by the Attorney General were reviewable, our criminal law system would be in a shambles. Finally, Craig, J. finds that there was no evidence to suggest the Attorney General failed to uphold the law or that he was acting out of improper motives or for an improper purpose.

It should be noted that this case arose in the midst of an appeal of the *Morgentaler* case before the Supreme Court of Canada. Accordingly, there were, undoubtedly, strong policy pressures for the judge to honour the Attorney General's stay of proceedings until the abortion issue could be settled.

The *Hamilton* case[39] provides a more alarming example of the court's position on Crown discretion. Here, the petitioner is a special-interest group called Life Force. It alleges three summary conviction offences under section 402 of the *Criminal Code* relating to wilful infliction of unnecessary pain upon a dog. After the issuances of the summons but before the appearances of the three accused, an agent of the Attorney General of British Columbia entered a stay of proceedings in the matter.

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35. D.C. Morgan, "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter" in (1986-87), 29 Cr.L.Q. 15, at p.16.
36. *Campbell* v. *Attorney General of Ontario* (1987), 31 C.C.C. (3d) 289 (Ont. H.C.).
37. *Ibid,* at p.296.
38. *R.* v. *Moore et al,* (1986), 26 C.C.C. (3d) 474 (Man. C.A.).
39. *Re Hamilton and the Queen* (1986), 30 C.C.C. (3d) 65 (B.C.S.C.).

Life Force raised two issues: whether the Crown has the power to stay a summary conviction proceeding commenced and prosecuted by a private prosecutor; and whether the Crown's right must be exercised in accordance with principles of fundamental justice under s. 7 of the *Charter.* McKenzie, J. concludes:

> The Crown does have the discretionary right to intervene in criminal matters, and having done so, to stay a private prosecution. Stated conversely, a private prosecutor does not have a legal right or liberty to continue a prosecution in the face of Crown intervention. The traditional justification for this Crown prerogative is the presumed objectivity and impartiality of the Crown as contrasted to that possessed by individuals or special-interest groups.[40]

He also finds that the petitioner's section 7 argument fails. "The fact is that this individual's liberty given this broad definition, does not free him to continue a prosecution when he is met by the Attorney General's direction to enter a stay of proceedings. An exception could arise where clear evidence to support some flagrant impropriety on the part of Crown officers but no such suggestion is made here."[41]

That case provides an interesting illustration of one judge's perception of special-interest goups. He does not address the issue of whether or not there is substantial evidence to support the charges laid. Rather, he assumes that the Attorney General has a better grasp of what is just than does Life Force. Is this a valid assumption to make? Arguably it is not. Why not settle the matter by trial on its merits rather than suspend the proceedings in this manner?

In *Re Baker* [42] the petitioner's six year old daughter and younger brother were hit by a motor vehicle. The daughter died. There were five independent witnesses in the accident. Based on witnesses' statements and police reports, Crown counsel decided that there was insufficient evidence to warrant a criminal prosecution. Accordingly, the defendant was charged with careless driving. The petitioner, not being satisfied, attended before a Justice of the Peace and swore an information alleging dangerous driving. The Justice conducted an *ex parte* hearing and issued process. Less than one month later, the Crown entered a stay of proceedings on the private action. The petitioner then claimed section 15(1) of the *Charter* renders section 508(1)[now section 579] of the Code *ultra vires* only in so far as it relates to private informations. The petitioner argued that he was deprived of his right to equality before the law.

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40. *Ibid,* at p.66.
41. *Ibid,* at p.69.
42. *Re Baker and the Queen* (1986), 26 C.C.C. (3d) 123 (B.C.S.C.).

Toy, J. held that there is nothing in section 508(1) that indicates an unevenness of application to individuals or groups.[43] He concludes that even if there was a *prima facie* infringement of section 15(1), the Attorney General's action would be saved by section 1 of the *Charter.* Toy, J. states:

> The policy consideration that I consider of significance here is whether a private prosecutor's right to prosecute should be an unfettered one. In the recent past, counsel acting on behalf of the Attorney General in our criminal courts have been discharging their responsibilities with firmness and practical objectivity that has generally served our communities satisfactorily. The prospect of the loss of that attribute of objectivity convinces me that no such change is necessary at this time.[44]

Finally, the recent case of *Rudolf Wolff & Co.* v. *Canada* [45] illustrates the notion that the Crown cannot be equated with an individual. The Crown represents the State, and constitutes the means by which the federal aspect of our Canadian society functions. In situations similar to the one at hand the Crown is not an individual with whom a comparison can be made to determine whether a section 15(1) violation has occurred. In light of this case it is, at least, arguable that an individual would not be successful in a *Charter* challenge with respect to section 579 of the *Criminal Code* if it is argued that he or she is unequal before the law *vis-a-vis* the Crown.

These cases reflect the belief that the Crown has exercised its discretion prudently in the past so it will continue to do so in the future. As a result, the courts have maintained a hands off approach. Although lip service is paid to a possible different ruling in the event the Crown has engaged in some flagrant impropriety, there seems to be no judicial evaluation of what constitutes such an impropriety.

In the Oldman River case Crown conflict of interest is alleged. However, in light of the case law, it may be difficult to convince a court that the Attorney General is capable of exercising its discretion contrary to the public interest. More frightening, it may be difficult to convince a court that it should review the matter at all.

A system of private prosecution can be justified in terms of both society's interest in increased law enforcement and the individual's interest in vindication. In the field of environmental law, full participation by the citizen as a private prosecutor is required to compensate for the public prosecutor's improper action and inaction. However, in light of the position of the courts generally and the attitude of the Alberta Attorney

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43. *Ibid.,* at pp. 127-128.
44. *Ibid,* at p.128.
45. *Rudolf Wolff & Co.* v. *Canada,* [1990] 1 S.C.R. 695.

General specifically, it is quite possible that Canada's institution of private prosecution is in jeopardy. From an historical perspective, it is quite ironic that the principal purpose of private prosecutions was to provide a check on public authority with respect to the criminal process.

IV. *An Historical Look at Private Prosecutions*

The foundations of our prosecutorial system are rooted in Britain. Unlike Continental Europe's attitude of deference to public authority, the British common law tradition was one of hostility towards monopoly — government or otherwise. The most important aspect of British criminal prosecution was the fact that the entire system was founded upon the assumption that the responsibility for preserving the peace and bringing the offender to justice was one which belonged to each and every member of the community.[46] Thus, although the justice which was dispensed was the King's justice, its invocation depended almost exclusively on the initiative of the private citizen as victim or complainant. Accordingly, if the private victim or complainant did not initiate and conduct the prosecution of an alleged offender there would normally be no prosecution.[47]

It was in the context of this early system of criminal justice that the first traces of what were later to become the offices of the Attorney General and Solicitor General of England were to be found. It is not difficult to predict that a system based exclusively on private prosecutions could present difficulty. What happens when victims become intimidated or pressured into remaining silent? Does the public interest not have a stake in who is or is not prosecuted?

The state, through the King's attorney, assigned itself a limited role of direct intervention only in those matters in which the sovereign had a particular interest. For the most part, this intervention took one of two forms. Prosecutions could be initiated and conducted by the sovereign; or, in cases initiated by private informants, the Crown could terminate the proceedings prior to their conclusion. The rationale for this activism emanates from the Sovereign's prerogative as the 'fountain' of royal justice.[48]

It was at this point that the "nolle prosequi" power (translated; "I am unwilling that it should be prosecuted") surfaced in the common law. The exact origin of this precursor to the power to stay actions is

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46. P.C. Stenning, *Appearing for the Crown* (1986), at p.14.
47. *Ibid,* at p.14. British history reported in this section has been taken principally from this source.
48. *Ibid,* at p.17.

unknown. However the first recorded use of the "nolle prosequi" was in 1555.[49] The rationale for this power was to eliminate charges that were cleary frivolous or vexatious. It was a highly controversial tool exercised by the Sovereign. In practice it was seldom used.

Therefore, until the mid-nineteenth century the following procedure for trial was in place.[50] Charges of criminal offences, laid principally by private informants, were submitted to a grand jury of 23 men at each quarter session. These charges were submitted through process of committal for trial issued by a Justice of the Peace. The grand jury heard the accusations of the prosecutor and witnesses and then deliberated to decide whether the case was "ignoramus" or "a true bill". If the jury decided it was a legitimate charge (ie: not frivolous or vexatious) then it endorsed the process and the case proceeded to trial. During the course of this process, the Sovereign could intervene to enter a "nolle prosequi". This was done only in a handful of cases.

In 1879 England codified the Sovereign's right to intervene. The *Prosecution of Offences Act* did not establish a general system of public prosecution. Rather, it was designed to act in cases which appeared to be of importance or difficulty or in which special circumstances, such as a person's refusal or failure to proceed with a prosecution, appeared to render the action of the Director of Public Prosecutions necessary to secure the due prosecution of an offender.[51] The important point is that the legislation which created the public prosecutor was, like the earlier legislation, a corrective measure designed to shore up the existing system. The legislative intent was not to overturn private prosecution but to supplement it.[52] In fact, the Bill specifically states this idea.

Through the years there has been a very real erosion of the private prosecution power base adopted by Canada. This is illustrated in both this country's legislation and practice of government. "Prosecutor", as defined by the *Criminal Code*,[53] provides the presumption that the prosecutor is the Attorney General. Only if he or she fails to intervene does a private informant gain that status. Secondly, in Alberta, the Attorney General states explicitly that it is the policy of its department to intervene in all criminal matters.[54] Furthermore, it will stay all actions

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49. *Ibid,* at p.26. A more detailed examination of the "nolle prosequi" can be found in Stenning's book.
50. This procedure is taken from Stenning's book. See *Ibid,* starting at p.13.
51. *Supra,* note 17, at p.36.
52. *Ibid,* at p.42.
53. *Supra,* note 18, s.2.
54. *Supra,* note 6.

that are not investigated by Crown agencies. That policy completely fails to recognize a private prosecutor.

Arguably, Canada has changed direction completely away from its traditions to a new course of virtually absolute public prosecutorial intervention. The problem in changing direction so drastically, is that the new system does not provide the related safeguards found in a system that has been in place for many centuries. For example, in France individual citizens have not been permitted to prosecute criminal matters individually.[55] Rather, they have been given three functions. They may report the crime to a public authority; they can join in a trial as a civil party; and, if the public prosecutor elects not to prosecute, the victim or complainant can seek redress. The option of bringing the civil action illustrates that the state's attorney is not completely in control. He or she cannot extinguish a public action by refusing to prosecute.[56] Clearly, there is not such a mechanism available in Canada. Even if there was, the power to stay, as it is currently designed, would probably override it.

Among the major western legal systems, West Germany's system is unique in its concern with controlling prosecutorial discretion. The Germans have isolated the elements of the problem, and they have implemented legislation to limit or exclude prosecutorial discretion.[57]

The public prosecutor's monopoly is explicitly created by statute in Germany. *The Code of Criminal Procedure* outlines three remedies available to private interests in the event that the sovereign fails to prosecute. First, section 374 provides for private prosecution of a narrow class of eight misdemeanors dealing mainly with the protection of private dignitary and private property rights. These offences are trespass to domestic premises, insult, inflicting minor bodily injury, threatening to commit a crime upon another, unauthorized opening of a sealed letter, inflicting property damage, patent and copyright violation, and crimes proscribed by the unfair competition statute. If the prosecutor exercises discretion under section 153 to refuse to prosecute the victim may still prosecute. This prosecution is not conditioned on the public prosecutor's refusal to act as it is in France.[58]

Second, for more serious crimes, citizens may request an administrative and judicial review of the public prosecutor's exercise of discretion.[59]

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55. *Supra,* note 17, at p.42.
56. *Ibid,* at p.42.
57. J.H. Langbein, "Controlling Prosecutorial Discretion in Germany" (1974), 41 U. Chic. L. Rev. 439, at p. 439. "Prosecutorial discretion" here means the power to decline to prosecute in cases of provable criminal liability.
58. *Ibid,* at pp.461-462.
59. *Ibid,* at p.462.

This procedure is called "Klageerzwingungsverfahren". Section 152(2) of the Code provides that the public prosecutor shall take action against all judicially punishable acts, to the extent there is a sufficient factual basis. Accordingly, anyone is entitled to make a formal demand to the prosecutor asking him to prosecute in a particular case. If the prosecutor still declines to prosecute he must notify the complainant of this decision and explain the reasons. If the complainant is the victim of the crime and he or she is unhappy with this explanation he or she may seek departmental or judicial review. The state supreme court has original jurisdiction in these cases.

Third, an individual has the right to launch a departmental complaint against the prosecutor. Unlike the experience in Canada, such complaints have a major impact. Langbein says that most prosecutors endeavour to become judges. Complaints are not conducive to enhancing a prosecuting career so these persons attempt to avoid controversial situations.[60]

V. *Recent Canadian Developments*

Since Canada now places a great deal of importance on public prosecutions perhaps it would be wise to consider developing a scheme similar to that of West Germany. Should there not be some procedure to compel the Crown to provide reasons for invoking section 579 of the Code; and should there not be some method of comprehensive judicial review to determine whether those reasons are bona fide? By having such a system in place citizens could enforce Crown accountability. At the very least, as Stenning suggests, Canadian law reformers should draft a complete and clear set of provisions outlining all of the circumstances in which a criminal proceeding can be terminated by prosecutorial authorities.[61] This would assist the judiciary in its task to better evaluate whether or not the Crown is exercising its discretion contrary to the public interest.

Interestingly, a recent Law Reform Commission report has endorsed a greater role for private prosecutions in Canada. What is curious about this report is that it's recommendations completely fail to address the Attorney General's discretion and the power to stay. It would appear that the Commission has neglected to examine the reality of widespread stays of actions. By failing to do so, it missed a golden opportunity to put forth constructive recommendations that would strengthen the private prosecution institution.

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60. *Ibid,* at p.466.
61. *Supra,* note 45, at p.364.

The Law Reform Commission states:

> It is our belief that a criminal justice system that makes full provision for private prosecution of criminal and quasi-criminal offences has advantages over one that does not. In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring such participation.[62]

It continues:

> ... we have concluded that, as nearly as possible, the private prosecutor ought to enjoy the same rights as the public prosecutor in carrying his case forward to trial and ultimately to final disposition on appeal. This is a modest proposal but an important one, since it underscores our belief in the value of citizen/victim participation in the criminal justice system and serves to reinforce and demonstrate the integrity of basic democratic values.[63]

The Commission finds that offences relating to environmental quality are the sort of quasi-criminal offences that may be ripe for increased prosecution by individual citizens or special-interest groups. But, although it recommends that the private prosecutor ought to enjoy the same rights as the public prosecutor in carrying his or her case forward, it states, "All of the foregoing recommendations are subject to the right of the Attorney General to intervene in any prosecution in order to carry the case forward, or stay the proceedings, or withdraw the charges."[64] At no time does the Commission provide a set of criteria that should be followed by the Crown when it considers to stay an action.

In summary, the case law, commentaries, and the state of Canada's procedure with respect to the system of private prosecution suggests that Martha Kostuch stands a very slim chance of success if she were to request judicial review of the Alberta Attorney General's decision to stay her private action. It would appear that she must demonstrate that the Crown exercised its discretion in a flagrantly abusive manner. This is not an easy task when there exists no criteria to evaluate such manner. Although she could illustrate how unfair the current state of the law is relative to that of other countries, the success of such a policy argument in court is questionable at best.

VI. *Mandamus Action*

As mentioned earlier, the second avenue available to Kostuch is to bypass

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62. *Supra,* note 17, at p.3.
63. *Ibid,* at p.4.
64. *Ibid,* at p.31.

the Provincial Crown and convince the Federal Justice to intervene to lay an information and proceed to prosecute the matter. As was illustrated in the *Sacobie* case the authority of the Attorney General of Canada to institute and conduct quasi-criminal offences is entrenched in the *Criminal Code.* If the information is laid at the federal level that level has exclusive jurisdiction over the matter. Essentially the provincial Crown is frozen out in those circumstances.

It is now recognized that public law has a positive and not merely negative aspect.[65] There are occasions when justice can be done not by preventing government from acting but by compelling it to act in a particular manner. Enforcement of the legal duty to enforce the law is regarded as one of the principal objects of the writ of *mandamus.*

The prerogative writ of *mandamus* is a discretionary remedy not usually granted in situations where another remedy is available. Historically, it has been quite an onerous task to obtain such an order.[66] The rationale was to prevent the appeal of every questionable exercise of administrative discretion. However, in light of current demands placed on government, there is a resurgence of consideration of this option.

There are four essential aspects of *mandamus.*[67] First, in order to have standing to seek such an order, the consensus of judicial opinion demands that an applicant illustrate he or she has some legal right which he or she cannot enforce or enjoy unless the respondent performs his or her legal duty. Traditionally, the applicant had to demonstrate that this legal duty was owed to him or her personally. It is suggested that there is now a departure from the "purely for the benefit of the subject" concept. Rather, one has standing if the goal is the advancement of justice.[68] This idea is illustrated in *R.* v. *Commissioner of Police; Exparte Blackburn.*[69]

In that case Denning, M.R. held that the applicant had standing to seek the writ if he had a 'sufficient interest to be protected'. He interpreted this to mean that a householder would have a sufficient interest, entitling him or her to seek a writ against his or her local police chief, if that officer issued an instruction forbidding prosecution of persons alleged to be housebreakers. Furthermore, it would be fantastically unrealistic to expect the applicant to undertake the financial burden of launching a

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65. A.J. Harding, *Public Duties and Public Law* (1989), at p.vii.
66. See Harding, *Ibid.*
67. R.S. Tracy, E.I. Sykes, *Cases and Materials on Administrative Law* (1975), at pp. 18-20. Tracy presents a good overview of the criteria courts look at when they grant a *mandamus* order.
68. *Supra,* note 64, at p.196.
69. *R.* v. *Commissioner of Police; Exparte Blackburn,* [1968] 2 Q.B. 118.

private prosecution. Therefore, the private prosecution was not considered an alternate remedy ripe for not granting a *mandamus* order.

Second, the interest of the applicant must be real or genuine and not merely one which is colourable. In other words, the applicant must not have ulterior motives for requesting the order.

Third, as a matter of courtesy, courts occasionally decline, in the exercise of their discretion, to issue a *mandamus* against an official who is ready, willing and anxious to perform his or her duty but has misconceived it.[70] Finally, where the duty which has not been performed is one which requires the exercise of discretion, mandamus will not issue to compel the discretion to be exercised in one way rather than another.[71] It will issue simply to compel the discretion to be exercised.

The general perception of the law on *mandamus* is one of confusion. Since the remedy is discretionary courts have, arguably, based their decisions on a visceral reaction rather than on a sound legal argument. In other words, "A citizen's action has in practice been allowed to develop, almost by conspiracy, because of the beneficial results which accrue from such actions. Yet among all the high-flown language of the judges there is hardly anything which provides a sure legal basis for a citizen's action to enforce a public duty."[72] Accordingly, a responsible individual or interest group with a genuine concern cannot be assured of success at achieving standing for *mandamus.*

One case that offers hope to an otherwise uncertain situation is *Padfield* v. *Minister of Agriculture.*[73] In that case the relevant statute established a milk marketing scheme. This scheme provided for a committee of investigation which had the duty, if the Minister in any case so directed, of considering and reporting to the Minister certain complaints concerning the operation of the scheme. The producers in one region were unhappy that the differential factor in price fixed for their region was outdated because of increased transport costs. They complained to the Minister but he refused to act, arguably because he might be obliged to act on a finding in favour of the complainants by overriding the Board's decision. The Minister did, however, concede that the complaint was relevant and substantial. The House of Lords granted *mandamus* compelling the Minister to consider the application according to the law. The Court held:

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70. *Supra,* note 66, at p.20.
71. as per A.J. Harding. See *Ibid.* at p. 20.
72. *Supra,* note 64, at p. 204.
73. *Padfield* v. *Minister of Agriculture,* [1968] A.C. 997 (H.L.).

> The Act imposes on the Minister a responsibility whenever there is a relevant and substantial complaint that the board is acting in a manner inconsistent with the public interest, and that has been relevantly alleged in this case. I can find nothing in the Act to limit this responsibility or to justify the statement that the Minister owes no duty to producers in a particular region.... So long as it does not act contrary to public interest the Minister cannot interfere. But if it does act contrary to what both the committee of investigation and the Minister hold to be the public interest the Minister has a duty to act.[74]

The difficulty arises in establishing what constitutes the Attorney-General of Canada's duty. If the duty is simply to exercise discretion regarding the laying of a charge then it is questionable whether Kostuch can compel the federal Crown to actually lay an information and prosecute the alleged perpetrators. Section 41(4) of the *Fisheries Act* states:

> s. 41(4)
> Notwithstanding that a prosecution has been instituted in respect of an offence under section 40, the Attorney General of Canada may commence and maintain proceedings to enjoin anything punishable as an offence under that section.[75]

This provision does give the Attorney General of Canada a certain degree of discretion by including the permissive word "may".

An argument involving the "semantic approach" might be useful in the present circumstances.[76] It is suggested that a simple enabling provision may in practice prescribe a pattern of behaviour. In a case of "if X, then A may do Y" there may be a duty, whether express or implied, to investigate the relevant matters (for example, whether X exists or if X exists, whether A ought to do Y). Secondly, a proper construction of the provision may entail a duty to exercise the power if the circumstances warrant it. Except where the entire scheme is intended to be optional, there must be situations in which the legislation intended that the power in question should be exercised. In conclusion, the fact that a discretion is given cannot mean that the donee is entitled to exercise it in such a way as to flout the very purpose of its being conferred. For this reason a power can become obligatory, especially where the conditions for exercising the power take the form "if A is satisfied that X, then A may do Y".[77]

Although the semantic approach makes good logical sense, it is not known at this time whether the courts will accept it. It does seem

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74. *Supra,* note 64, at p.20. This case is cited by Harding.
75. *Supra,* note 18, s.41(4).
76. *Supra,* note 64, at p.17. See Harding for a more detailed explanation of the 'semantic approach'.
77. *Ibid,* at p.17.

ludicrous to suggest that, when there exists a comprehensive legislative scheme to protect fish habitats, when there exists solid evidence of the active destruction of one such habitat, and when there appears to be provincial refusal to intervene and insure compliance of the Act, the Attorney General of Canada does not have a bare duty, under s. 41(4), to exercise its discretion in favour of prosecuting the alleged offenders. Notwithstanding the discretionary nature of a *mandamus* action, this approach may be a viable alternative to Kostuch's pursuit of private prosecution.

VII. *Conclusion*

Clearly, it is very difficult for concerned individuals to actively enforce environmental protection laws. The weak-spirited need not even try. For it is often long, complicated, and a distressingly disappointing ordeal. Persons such as Dr. Martha Kostuch should be commended for their enthusiasm and determination in the pursuit of environmental protection. It is perplexing to discover that these people often stand alone in bringing environmental offenders to justice. Although governments have developed comprehensive legislation, they have neither the ability nor the will to enforce these laws. Inevitably, these circumstances raise the fundamental question: What is the purpose of law if it is not enforced?

Author's Note:
Dr. Martha Kostuch is still actively engaged in her attempt to privately prosecute the alleged offenders of the *Fisheries Act.* On July 25, 1990 she laid new informations. On October 18, 1990 an application was made by the Attorney General of Alberta to quash these informations alleging abuse of process. Fradsham, Prov. Ct. J. decided that there was no abuse of process. Dr. Kostuch is now scheduled to appear before Fradsham, Prov. Ct. J. on May 21, 1991 to have process issued. This process hearing date is subject to an appeal launched in the Alberta Court of Queen's Beach by the Attorney General of Alberta. Dr. Kostuch has also launched *mandamus* actions, the details of which are not known at this time.